Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision of Federally Tariffed Interstate Access Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
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Implementation of the Non-Accounting Safeguards Of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
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2000 Biennial Regulatory Review — Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
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AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance By ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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SBC Communications Inc., on behalf of itself and its subsidiaries (collectively referred to as "SBC"), submits this Reply to comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

In its recent Notice initiating the first triennial review of the Commission's unbundled network elements (UNE) policies and rules, the Commission strongly encouraged parties to submit evidence regarding actual marketplace conditions, and in particular what alternatives to

the incumbents' networks are available and where.[1] Based on its experience in prior proceedings, the Commission found that such evidence was "more probative than other kinds of evidence."[2]

The Commission was right to insist that parties provide hard facts regarding the availability of alternatives to the incumbents' networks in the Triennial Review, and should insist on the same quality of evidence here. Six years after the Act, there is no excuse for parties to rely on anecdotes and inflated rhetoric, rather than hard evidence, to support their claims about the lack of alternatives to the ILEC networks in pressing for unlimited access to ILEC facilities. Nor is there any excuse for parties in this proceeding not to provide data regarding what alternative special access facilities are available and where.

CLECs and other proponents of special access performance measures fail utterly to meet this standard of evidence. They claim variously that the market for special access services is not competitive, that ILEC special access performance is unacceptably poor and discriminatory, that existing ILEC service quality plans are inadequate, and that federally-mandated service quality requirements (performance measurements, standards and remedy plans) are necessary. But these parties offer no data to contradict the hard evidence in the record that the market is, indeed, competitive. They offer no data to rebut evidence that competitive providers of special access services have invested billions of dollars building out their networks and facilities, which now

[1] *Review of the Section 251Unbundling Obligations of Incumbent Local Exchange Carrier; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-339, 96-98, and 98-147, Notice of Proposed Rulemaking, FCC 01-361, para. 17 (rel. Dec. 20, 2001) (*Triennial Review NPRM*).

[2] *Id.*

serve virtually every area in which customers demand special access services and readily can be extended to any potential customer not currently served. Nor do they cite evidence of ILEC discrimination, apart from their repeated reference to a single order by the New York Public Service Commission (PSC) relating to Verizon's special access services in New York. Whatever the merits of that order, it hardly demonstrates the existence of a nationwide pattern of poor and discriminatory performance, as CLECs claim. Nor, consequently, does it or any other of the overheated rhetoric offered as "evidence" support the adoption of federally mandated national performance measures and standards for special access services.

In fact, the only hard evidence offered in this proceeding demonstrates that Commission action is unnecessary and would be counterproductive, in light of expanding competition in the market for special access services. It is unnecessary because ILECs, in response to increasing competition for special access services, already have responded to customer demand by developing special access service quality assurance plans that include negotiated performance measures, standards and remedies. It would be counterproductive because it would co-opt market-based solutions, increase carriers' costs (which inevitably would be passed on to consumers), and, if applied only to ILECs, distort competition.

If, despite the evidence of competition and market-based solutions, the Commission determines that regulatory action is necessary, it should reject the Joint CLEC Proposal as excessive, arbitrary and unreasonable. This proposal is unprecedented in its scope and intrusiveness, and goes way beyond any action the Commission ever has deemed appropriate to address the risk of discrimination, even in a monopoly environment. It also is extraordinarily burdensome, as evidenced by the vehemence with which proponents of the proposal argue that it should not apply to them. In addition, the Joint CLEC Proposal is patently arbitrary —

proponents of the plan offer no justification for the strict performance standards they propose; they simply fabricate them out of whole cloth. Indeed, their plan seems motivated more by a desire to generate payments than anything else.

In any event, if the Commission decides to adopt performance plans, it must reject calls for federally-mandated self-effectuating liquidated damages or automatic penalty payments. Such requirements are not only unnecessary (in light of voluntarily negotiated remedy plans) they also are patently unlawful. The Communications Act establishes detailed procedural requirements that the Commission must follow before it can impose any penalties or damages, and provides no authority for the Commission to impose liquidated rather than actual damages. The Commission cannot circumvent these limits on its authority and create new compensation or penalty schemes with no basis in the Act.

II. SPECIAL ACCESS PERFORMANCE MEASURES ARE NOT NECESSARY

A. Competition for Special Access Services Renders the Proposed Performance Measures Unnecessary

As SBC discussed in its comments, and the Commission has long acknowledged, price and service quality controls are unnecessary, and indeed counterproductive, in competitive markets. Regulation is unnecessary because, in competitive markets, consumers can switch to alternative suppliers, disciplining any firm that fails to provide the types and quality of services, and prices demanded by consumers. Regulation also is counterproductive because it is a blunt instrument that distorts markets by limiting a carrier's ability to respond to changes in demand and imposing costs that ultimately must be passed on to consumers. Because it has recognized that competition protects consumers better than regulation ever could, the Commission

consistently has decreased regulation where competition is taking hold.[3] Even proponents of special access performance measurements (PMs) concede that regulation in the face of competition is unnecessary.[4]

In its comments, SBC offered marketplace evidence demonstrating that the special access market is vibrantly competitive. In particular, SBC showed that the number of competitive special access service providers has reached approximately 350, and that they already have captured approximately 36 percent of the special access/private line market.[5] SBC further showed that special access competition is so widespread that, under the Commission's market-based framework for measuring special access competition, markets generating 80 percent of BOC special access revenues qualify for Phase I pricing flexibility, and markets generating nearly two-thirds of such revenues qualify for Phase II relief.[6] And these numbers actually understate the competition for special access services because they do not consider competition

[3] Congress too has recognized that competition is superior to regulation, and therefore required the Commission to scale back or eliminate regulation in response to growing competition. *See* The Teleommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the goal of the Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers"); 47 U.S.C. § 161 (requiring the Commission biennially to review all regulations issued under the Act to determine whether such regulation is no longer necessary due to competition).

[4] *See, e.g.,* Comments of Time Warner Telecom and XO Communications, Inc., at 29 ("there is no basis in either policy or the Commission's precedent for imposing performance rules on competitive carriers:" a "'customers ability to switch to another provider of service' gives competitive carriers a 'significant . . . incentive to enhance their competitive position' thereby making regulation unnecessary") (citing *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules*, Final Report and Order, 78 FCC Rcd 1291 (1980)).

[5] SBC Comments at 9 (citing *Special Access Fact Report* at 5). *See also* Verizon Comments at 5.

[6] SBC Comments at 10; Verizon Comments at 5-6.

from interexchange carriers (IXCs) and CLECs that bypass ILEC facilities, and connect end-users directly to fiber rings that connect directly to IXC POPs and Internet service providers (ISPs).[7]

As SBC anticipated,[8] proponents of special access PMs claim that the special access market is not competitive because competitors have not yet deployed competitive facilities everywhere.[9] These parties further assert that, in many instances, it is uneconomical for CLECs to extend their networks to reach additional end users, and, consequently, they are forced to rely on ILECs for special access services.[10]

Proponents of special access PMs grossly overstate the extent to which they are "forced" to rely on ILEC special access services. To be sure CLECs and other competitive special access and fiber providers have not yet deployed alternative facilities ubiquitously. But as SBC showed

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[7] SBC Comments at 10; Verizon Comments at 6. In its comments, Verizon points out that the large IXCs not only are the largest purchasers of special access, they also are major suppliers. For example, AT&T and WorldCom have local facilities used to provide special access in nearly 200 markets, and Sprint is deploying local fiber rings in 20 major markets. Verizon Comments at 5.

[8] SBC Comments at 9.

[9] *See* WorldCom Comments at 3-4, 10; Time Warner/XO Comments at 7-11; Cable & Wireless Comments at 4; AT&T Comments at 9-10. Many PM proponents claim that they use CLEC-provided facilities wherever possible, but, in the majority of cases, are forced to use ILEC special access services. *See, e.g.*, Cable & Wireless Comments at 4; and WorldCom Comments at 10. These commenters fail to provide any evidence to support their claim, or any data regarding what alternative facilities are available and where. Their failure to do so is telling. Before the Commission even considers imposing costly and burdensome new performance requirements on one sector of the special access market (ILECs), it should require all carriers to report what facilities they have deployed and where. Only then can the Commission test the validity of their claims regarding the lack of alternative facilities.

[10] *See, e.g.*, Time Warner/XO Comments at 45; WorldCom Comments at 11-12; ASCENT Comments at 3; ALTS Comments at 7.

in its comments, competitors need not deploy alternative facilities everywhere to compete effectively in the special access market.[11] As the Commission itself has acknowledged, special access end users differ markedly from typical purchasers of other services; they are "IXCs and large businesses," which "generate significant revenues . . . and are not without bargaining power."[12] Special access end users also are highly concentrated geographically. For example, more than 80 percent of SBC's special access revenues are derived from less than 25 percent of the wire centers in which it provides special access.[13] This high degree of concentration generates significant economies of density, reducing significantly the cost of extending facilities to reach new customers along competitive fiber networks.[14] As a consequence, through targeted investment, a competitor readily can reach all or virtually all of the customers that demand

[11] SBC Comments at 9, citing Special Access Fact Report at 2-5.

[12] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Carriers; Petition of US WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier*, Fifth Report and Order, 14 FCC Rcd 14221, para. 142 (1999) (*Pricing Flexibility Order*), *aff'd WorldCom, Inc. v. FCC*, 235 F.3d 449 (D.C. Cir. 2001). Significantly, in granting ILECs pricing flexibility, the Commission concluded it should not delay relief until access customers have a competitive alternative for each and every end user because doing so would enable competitors to "game the system" by preventing incumbents from obtaining relief "simply by choosing not to enter certain parts of that MSA or to serve certain customers." *Id.* at 143 (adding, "[w]e will not distort the operation of the market in this manner"). Thus, the Commission apparently was skeptical of claims that competitors could not build out to special access customers, and rightly so.

[13] Special Access Fact Report at 3. The special access customers of other BOCs are similarly concentrated: 80 percent of Verizon's special access revenues are generated in 20 percent of its wire centers, 60 percent of Qwest's special access revenues are derived from 11 percent of its wire centers, and 91 percent of BellSouth's special access revenues are generated in 20 percent of its wire centers. *Id.*

[14] Reply of Verizon, SBC, and BellSouth, CC Docket No. 96-98, Attachment B — Reply Declaration of Robert W. Crandall (Crandall Declaration) at 5 (filed June 25, 2001).

special access services. Indeed, it appears that is precisely what competitive special access providers have done.[15]

But even if competitive providers of special access services currently do not have facilities to address specific end users, they readily can extend their networks and services to new areas and customers in response to demand. Indeed, based on historic deployment and the characteristics of the special access market, Professor Crandall estimates that approximately 89 percent of all buildings that contain potential special access customers are sufficiently attractive and close to competitive fiber to justify extending special access services to those premises.[16] And, when those buildings are weighted by expected revenues, 97 percent of all special access revenues are derived from buildings sufficiently close to competitive fiber to justify extending facilities to those premises.[17]

Some proponents of special access PMs have claimed that, even if they could build out, constructing new facilities takes "months and sometimes years to complete," and most customers are unwilling to wait so long to obtain service.[18] They assert that, consequently, they are forced to rely on ILECs to provide service in a timely manner.[19] But competitive special access providers tell a very different story to Wall Street. Just last week, for example, Time Warner

[15] *See* Special Access Fact Report at 6-7.

[16] Crandall Declaration at 34.

[17] *Id.*

[18] *See* Time Warner/XO Comments at 6-7; AT&T Comments at 7 ("New network construction . . . can take months or even years to complete. Most end users are unwilling to deal with these delays; when they want service, they generally want it.").

[19] Time Warnmer/XO Comments at 6-7.

Telecom announced to investors that it had won the New York State Unified Courts System as a new customer, and that "[o]ur ability to construct our own fiber facilities into their seven location [sic] in four cities within 30 days was key to winning this opportunity."[20]

In any event, claims that competitive special access providers cannot extend their facilities to reach new end users is belied by the actions of competitive providers of special access services. The Special Access Report, relying on independent market data compiled by the New Paradigm Resource Group,[21] documented the explosive growth of facilities-based special access competition. In particular, it showed that, between 1999 and 2000, the number of competitive special access providers grew to almost 350, the number of competitive fiber miles grew by approximately 35 percent, and CLECs captured 36 percent of the special access/private line market.[22] It further showed that the number of CLEC fiber networks in the 150 largest MSAs (which contain nearly 70 percent of the population and account for more than 80 percent of special access revenue) has grown from 486 to 635.[23] And CLECs serve approximately 1.15 million buildings overall, and 175,000 commercial office buildings (which represents approximately 25 percent of commercial office buildings nationwide) with their own fiber.[24]

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[20] Larissa Herda, President and CEO, Time Warner Telecom, Conference Call Announcing Fourth Quarter Results (Feb. 5, 2002).

[21] Some have criticized the New Paradigm data as "proprietary" data with computational errors. But as the Special Access Rebuttal Report observes, ALTS, AT&T, WorldCom and the Commission itself have cited New Paradigm's data in the past. Special Access Rebuttal Report at 4.

[22] Special Access Fact Report at 6.

[23] *Id.* at 11.

[24] *Id.*, citing *CLEC Report 2001*, Ch. 6 at Table 11.

Plainly, competitive special access providers would not have deployed all these facilities if they thought they could serve only a handful of buildings and customers. The prevalence of existing alternative facilities, and the pace at which they were deployed, thus demonstrates that competitors can provide competitive special access services wherever there are business subscribers that desire such services.

Competitors claim that the extensive areas in which ILECs have qualified for pricing flexibility are irrelevant because, in establishing a framework for pricing flexibility for ILEC special access services, the Commission declined to declare ILECs non-dominant in the provision of those services.[25] They argue that dominant carriers, by definition, possess market power, and that performance measurements therefore are necessary to ensure just and reasonable, and nondiscriminatory service. These arguments are specious. While the Commission has not yet declared ILECs non-dominant in the provision of special access services, it has, in response to growing competition, substantially reduced its price regulation of these services in the vast majority of areas in which they are offered. CLECs fail to explain how the Commission could conclude that price regulation ought to be reduced while service quality regulation should be increased. They certainly fail to square the Commission's decision to substantially *deregulate* the prices of special access with the smothering array of service quality measures and standards they propose. These measures and standards are unprecedented in their scope and intrusiveness,

[25] *E.g.*, WorldCom Comments at 32-34; AT&T Comments at 11; Cable & Wireless Comments at 11. WorldCom even goes so far as to claim that "[r]ecent [Commission] decisions support the conclusion that incumbent LECs retain considerable market power in the provision of special access service." WorldCom Comments at 33 (citing *Petition of U.S. West Communications, Inc. et al.*, Memorandum Opinion and Order, CC Docket No. 98-157, 14 FCC Rcd 19947 (1999)). But WorldCom neglects to mention that the only Commission decision it cites for support was vacated by the D.C. Circuit. *AT&T Corp. v. FCC*, 236 F.3d 729 (2001).

far surpassing anything the Commission ever has imposed, even in an era of monopoly-franchised service.

It is no answer to argue, as some have, that some competitive providers of special access services are facing financial difficulties or have gone bankrupt.[26] Chairman Powell, for one, has stated that these kinds of arguments should not distort public policy decisions.[27] In any event, the fact that some *firms* may exit the market does not mean that the *facilities* they deployed will exit as well. The fact is, such facilities are sunk investment, and will continue to be available to the market, and at fire sale prices. As a leading telecommunications analyst stated last week, "bankruptcy does not necessarily eliminate [supply]; it only resurrects it on *competitive steroids*."[28]

Nor is it significant that the prices for some special access service options are higher in some MSAs in which the Commission has granted Phase II pricing flexibility than in non-Phase II areas.[29] In granting pricing flexibility, the Commission specifically acknowledged that Phase

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[26] *See, e.g.*, AT&T Comments at 10-11 (claiming that "[a]s the number of competitors continues to dwindle, what little market discipline that may have existed may well disappear"); American Petroleum Institute (API) Comments at 4-5.

[27] Paul Davidson, *FCC chief Powell Takes hands-off approach*, USA TODAY, Feb. 6, 2002, at 1B ("'There's this tendency to think that I'm somehow the puppet master and because, oh, the economy's down and these guys are hurting, so I'm going to do a little something for them,' Powell says in an interview in his corner office. 'My religion is the market.'").

[28] Scott Cleland, *Telecom's Debt Spiral*, PRECURSOR GROUP, Feb. 5, 2002.

[29] *See* Ad Hoc Telecom. Users at 4. SBC notes that, the fact that prices for some service options in some Phase II areas are higher than in other areas does not mean that rates have gone up. In most instances where this is true, rates are higher because the productivity price cap factor does not apply.

II relief might result in higher rates for some customers.[30] But it concluded that such increases might well be warranted because "[its] rules may have required incumbent LECs to price access services below cost in certain areas."[31] It further found that a Phase II showing was "sufficient evidence that competitors' market presences have become significant, and that the public interest is better served by permitting market forces to govern the rates for . . . access services."[32] Proponents of special access performance measures have offered no basis for revisiting that determination here. Nor have they explained why the Commission should be ramping up service quality regulation for special access services at the same time it is scaling back its regulation of special access prices.

Even assuming, *arguendo*, that customers lack alternatives to ILEC special access services in certain areas, market forces elsewhere would force carriers to provide quality special access services in those areas. It is beyond dispute that the special access market, as a whole, is subject to significant and growing competition. The terms and conditions on which ILECs offer special access services must account for this competition because customers purchase special access on terms and conditions that apply to their entire networks. That is, performance measures and standards are not negotiated on a wire center-by-wire center, or MSA-by-MSA, basis; they are incorporated into tariffs that establish the terms of service everywhere. As a result, competitive conditions in markets such as downtown Chicago and Dallas effectively drive SBC's service quality standards throughout its entire region. In this sense, the CLEC arguments

[30] *Pricing Flexibility Order*, FCC 99-206 at para. 155.

[31] *Id.*

[32] *Id.*

that there are pockets of areas in which special access competition is lacking is nothing more than a red herring.

B. Market-Based Solutions are Preferable to Regulatorily-Prescribed Performance Measures and Standards

In its comments, SBC noted that, as a direct reflection of increasing competition for special access services, it has incorporated special access performance measures, standards and remedies in its standard special access tariffs. It noted further that it has negotiated arrangements that offer carriers an even higher level of protection. These so-called "MVP" arrangements are being utilized by carriers accounting for approximately one-third of SBC's special access revenues, and over 50 percent of its wholesale special access revenues. In addition, SBC meets on a monthly basis with any customer that chooses to do so to identify any service quality concerns they might have and to devise solutions, including service improvement plans, if necessary, that ensure that carriers' service quality needs are being met.

WorldCom, not surprisingly, attempts to dismiss these initiatives. It claims that incumbent LECs routinely discriminate against CLECs in the provision of special access services, offer no service quality protection, and, in general, treat their CLEC customers "with impunity." While WorldCom's comments are long on inflammatory rhetoric, they are noticeably short on specifics. In fact, virtually the only evidence WorldCom offers to support its over-the-top claims is a single order by the New York Public Service Commission relating to Verizon's special access services in New York. Whatever the merits of that order as a snapshot of the situation in New York, it hardly demonstrates the existence of a nationwide pattern of poor and discriminatory performance, as WorldCom claims. In fact, WorldCom's own comments demonstrate the disingenuous nature of its claims. On the one hand, it claims that incumbent

LECs have long had the incentive and ability to discriminate in the provision of special access services, yet it simultaneously notes that incumbent LECs are effectively barred from competing in the market for which special access services are primarily used by WorldCom – what it terms the "market for enterprise telecommunications services."[33]

In addition to taking unsubstantiated pot shots at incumbent LEC special access performance, WorldCom disparages the service quality protections offered by incumbent LECs, including SBC.[34] It claims, for example, that SBC's MVP tariff offers only the most meager of performance plans, that it measures only three service quality parameters, does so against weak standards, and offers only minimal compensation if those standards are not met. WorldCom's claims are hard to square with the fact that AT&T specifically asked the Texas PUC, when it was considering special access performance measures, not to take any action that would displace its negotiated arrangement with SBC. Moreover, contrary to WorldCom's assertion that SBC provides only three performance measurements, SBC in fact has collaborated with WorldCom to fashion an extensive Access Performance Objective Plan pursuant to which SBC provides WorldCom 38 access performance measurements on a monthly basis. SBC also meets with WorldCom every month to discuss service improvement plans.

Given these initiatives, the Commission may wonder why WorldCom and others are so intent on obtaining rigorous federally mandated performance measures and standards. The

[33] WorldCom Comments at 7. WorldCom suggests that the "BOCS' incentive to engage in anti-competitive behavior … will increase significantly as they gain authority to provide long-distance." *Id.* at 7. This amounts to nothing more than speculation, though, which is hardly a basis for the blanketing array of measures WorldCom proposes. SBC has already received section 271 authority in the entire Southwestern Bell region, and there is no evidence that SBC has altered its special access provisioning in the manner suggested by WorldCom.

[34] WorldCom Comments at 25.

reason is quite simple and it is more than evident from even the most cursory review of the joint CLEC proposal: these carriers have proposed a blanket of measures accompanied by impossibly strict standards in a cynical ploy to guarantee themselves a continuing flow of remedy payments. It is that simple, and SBC notes, in this regard, that these standards have virtually nothing to do with the purported discrimination concerns that the CLECs cite in their effort to obtain performance measures and standards.[35]

C. CLECs Grossly Exaggerate the ILECs' Incentive and Ability to Discriminate in the Provision of Special Access Services

According to the CLECs, special access performance measures and standards are necessary to detect and deter discrimination by ILECs in the provision of special access services.[36] CLECs grossly exaggerate the risk that ILECs can and will discriminate. First, the CLECs' claims about discrimination are largely unsubstantiated and speculative. Aside from the findings of the NY PSC, they cite no evidence of any pattern of ILEC discrimination today. Moreover, while they argue that ILECs will have an increased incentive to discriminate when they receive 271 authority, they offer no evidence that existing 271 approvals have had any impact on special access performance. Given the deregulatory goals of the Act and the Commission's stated preference for market-based solutions, unsupported claims and speculation regarding future conduct should not form the basis for new and burdensome regulation.

Second, even assuming, *arguendo*, that ILECs have or will have an incentive to discriminate in the provision of special access services, they do not, and will not, have the ability

[35] SBC discusses below this proposal in greater detail.

[36] CLECs fail to reconcile their argument that special access performance measures are necessary to detect discrimination with their vociferous allegations that discrimination already is occurring.

to do so. Proponents of special access performance measures theorize that ILECs will use their purported power in the upstream special access market to gain an unfair advantage in the downstream business market by discriminating against competitors in the provision of special access services.[37]

Apart from being pure speculation, such claims are not even theoretically plausible, and they rightly have been rejected by the Commission. As the Commission observed in addressing the risk that LECs could discriminate against competing interexchange carriers in their provision of terminating access service:

> In order to discriminate effectively through control of terminating exchange access, the BOCs and independent LECs would have to convince consumers that an inferior termination connection was the fault of their interexchange carrier, and that the only way to obtain efficient termination arrangements . . . would be through the BOCs' or independent LECs' interexchange services. In addition, to the extent such quality degredation is apparent to consumers, it is also likely to be apparent to regulators and interexchange competitors.[38]

Likewise, the Department of Justice has concluded that: "[D]iscrimination is unlikely to be effective unless it is apparent to customers. But, if it is apparent to customers, it is also likely to be apparent to regulators or to competitors who could bring it to the regulators' attention."[39] In a similar vein, the United States Court of Appeals for the

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[37] *See, e.g.*, WorldCom Comments at 8.

[38] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Market* Place, CC Docket Nos. 96-149 and 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15767, at para. 208 (1997) (LEC *Classification Order*).

[39] Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment, filed Feb. 3, 1987.

District of Columbia Circuit, in the context of BOC provision of information services, stated, "information service giants operating throughout the country, such as IBM, AT&T and GE, will notice any discrepancies in treatment by the various BOCs and will have the capacity and incentive to bring anticompetitive conduct to the attention of regulatory agencies."[40] That is no less true of the carriers and customers of carriers that purchase special access services. The notion that systemic discrimination that is apparent to customers and thus damages a company's reputation and service could occur without a company being aware of it therefore is patently absurd.

A number of CLECs and IXCs claim to "know" that ILECs are discriminating in the provision of special access services. It is impossible to reconcile this claim with their simultaneous assertion that they need special access performance data to determine *whether* discrimination is occurring. In any event, one wonders why, if they have evidence of discrimination, CLECs and IXCs have not availed themselves of existing complaint procedures to seek a remedy.[41] Only Time Warner claims it has attempted to utilize existing complaint procedures, and it simply gave up and declined the Commission's invitation to file a formal complaint when its rocket docket request was denied.[42] Its experience hardly forms any basis for concluding existing procedures are

[40] *United States v. Western Electric Co.*, 993 F.2d 1572, 1579 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 487 (1993).

[41] Given the plethora of complaints filed by CLECs, no matter how flimsy their cases, it is inconceivable that any purported lack of evidence has deterred CLECs and IXCs from filing complaints regarding special access discrimination. In any event, to the extent they lack sufficient evidence, the Commission's complaint procedures permit discovery.

[42] Time Warner/XO Comments at 50.

ineffective. Until the Commission obtains some experience litigating complaints regarding the provision of special access services, it cannot conclude that existing procedures are inadequate or too cumbersome to provide a meaningful remedy based merely on the say so of CLECs and IXCs, who clearly have an interest in tilting the playing field in their favor.

III. EVEN IF THE COMMISSION WERE TO TAKE SOME ACTION IN THIS AREA, THE CLEC PROPOSAL GOES FAR BEYOND THE REALM OF REASONABLENESS.

If the Commission decides, despite the evidence of competition and market-based solutions, that regulatory action is necessary, it should reject the Joint CLEC Proposal as excessive, arbitrary, and unreasonable.[43] The Commission has in the past established rules to address the risk to which the Joint CLEC Proposal purportedly is addressed — that ILECs will discriminate in their provision of one service to gain advantage in another. In the *Computer III* proceeding, the Commission required quarterly parity reports to address the concern that BOCs would discriminate in their provision of basic services to gain an advantage in the enhanced services market. The Commission did not include anything close to the level of disaggregation the CLECs now seek, it did not require competitor-specific reports, and it did not establish a remedy plan. Nevertheless, years later, the Commission concluded that there is no evidence that any BOC *ever* discriminated against a competing enhanced services provider.[44] Similarly, in the CPE context, the Commission required AT&T and the Bell Operating Companies to file

[43] Letter from A. Richard Metzger, Jr., on behalf of the Joint Competitive Industry Group, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 01-321, at Attachment A (Jan. 22, 2002) (Joint CLEC Proposal).

[44] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, 10 FCC Rcd 8360, at para. 29 (1995).

quarterly reports with far less disaggregation than the CLECs propose here. SBC is not aware that there ever has been a finding that AT&T or a Bell Operating Company discriminated in the provision of a service to gain an advantage in the CPE market. In each of these cases, the Commission was addressing the risk of discrimination in the provision of a monopoly service. Yet even then the Commission did not adopt anything close to the panoply of regulations the CLECs now propose. Particularly given that modest reporting requirements proved effective in a monopoly environment, there is no basis upon which the Commission reasonably could conclude that more is required here, assuming the Commission decides, counterfactually, that some action is necessary.

Not only is the CLEC proposal excessively burdensome and unprecedented in its scope, it also is patently arbitrary. For each of the eleven performance measures the CLECs propose, they propose strict performance standards. They offer absolutely no justification for these standards. They simply pull them out of thin air and then reveal their real agenda by asking for strict penalties for non-compliance. They do not even show that any carrier, anywhere, at any time ever has met these standards, much less that they represent an appropriate benchmark for assessing compliance with the substantive obligations of the Act. On this ground alone, the Commission must reject these proposals.[45]

The CLECs claim that their proposal will not impose any significant new burdens on ILECs because "most of those metrics are identical to or similar to the ones already mandated by

[45] Some CLECs suggest that, because their proposal is a joint proposal, it should be accorded greater weight by the Commission. Actually, the exact opposite is true. In order to forge consensus, it was undoubtedly necessary for the signators to this proposal to accommodate the demands of all of the signators, no matter how unreasonable. This is not, after all, an industry-wide proposal; it is strictly self-serving.

existing regulatory requirements (such as ARMIS or state reporting requirements), or that the incumbent LECs already report voluntarily to carry customers."[46] The CLECs cannot have it both ways. They cannot claim, on the one hand, that, absent federally-mandated measures and standards, they have no ability to protect themselves against unlawful discrimination, while maintaining, on the other hand, that they already receive much of the very information they propose be the subject of federal performance measures. The fact of the matter is that the CLEC proposal would impose substantial new burdens, not only because of an excessive number of performance measures, but because of excessively strict performance standards. Were this not the case, CLECs would not argue so vehemently that their proposal should apply only to Tier 1 ILECs.

Of course, if, as the CLECs claim, the standards they propose are "benchmarks" for just and reasonable service, those standards necessarily apply to all providers of special access services since even non-dominant carriers are subject to the substantive obligations of section 201(b) of the Act, in particular the obligation to provide service on just, reasonable, and not unreasonably discriminatory terms. In part, for that reason, any special access service quality requirements that the Commission adopts should apply equally to all providers of special access services, as the National Association of Regulatory Utility Commissioners recently concluded.[47]

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[46] WorldCom Comments at 43-44.

[47] National Association of Regulatory Utilities Commissioners, Committee on Telecommunications, Resolution on Special Access Performance Monitoring, adopted Feb. 12, 2002 ("RESOLVED, That the National Association of Regulatory Utilities Commissioners (NARUC) convened at its 2002 Winter Meetings in Washington, D.C., urges the FCC to adopt performance measures and standards, reporting requirements and a strong straightforward enforcement mechanism for the ordering, provisioning and maintenance of wholesale and retail interstate special access services *by all providers*").

Applying any such requirements to all providers not only would ensure that any standards adopted are reasonable and not the product of regulatory gamesmanship, it also would help prevent such standards from distorting competition by imposing significant costs on only one sector of the market. It is no answer to claim, as CLECs do, that applying special access performance standards to them is unnecessary because they will not attract and keep customers if they fail to provide good quality service. If the CLECs are correct, they would have no problem meeting any standards the Commission may adopt.

IV. THE COMMISSION MAY NOT ADOPT SELF-EFFECTUATING LIQUIDATED DAMAGES, OR AUTOMATIC PENALTIES

Federally-mandated self-effectuating liquidated damages or automatic penalty requirements for special access services are unnecessary because market forces already protect consumers and carriers from unreasonable or discriminatory special access services. These forces not only oblige carriers to provide good quality services (or risk losing customers), they also have driven them to establish service quality assurance plans that include both performance measures and penalties for missing service quality targets. The Commission's existing complaint and enforcement processes provide an additional safeguard against unlawful behavior.

But self-effectuating remedy plans are not only unnecessary, they also are unlawful. In its comments in the *UNE Performance Measurements Proceeding*, SBC established that the Commission has no authority to establish self-executing penalties and liquidated damages.[48] The Communications Act establishes detailed procedural requirements that the Commission must

[48] Comments of SBC Communications Inc. in CC Docket No. 01-318 (Jan. 22, 2002) (*UNE Performance Measurements Proceeding*). In its comments in this proceeding, SBC incorporated its analysis of self-effectuating remedy plans in its comments in the *UNE Performance Measurements Proceeding*.

follow before it can assess any penalties or liability for damages. And it provides no authority for the imposition of liquidated damages in lieu of actual damages. The Commission may not disregard these limits on its authority and create new compensation or penalty schemes with no basis in the Act, especially since these limits are grounded in the fundamental principle that a party must have notice and an opportunity to respond in an individualized way before damages or a penalty is assessed against it.

Not surprisingly, many proponents of special access performance measures urge the Commission to adopt self-effectuating penalty or liquidated damages requirements, and claim generally that the Commission has authority to do so.[49] But these parties fail to reconcile the remedies they propose with the detailed procedural protections and requirements set forth in the Act. Indeed, other parties implicitly concede that the Commission cannot adopt automatic penalties by proposing that the Commission adopt expedited forfeiture procedures, including: the automatic issuance of a notice of apparent liability (NAL) whenever an ILEC misses one or more metrics, an abbreviated opportunity for the ILEC to respond, and a presumption of liability for a forfeiture or damages "absent a catastrophic event."[50] These procedures are a sham. Although they pay lip service to the Act, they would effectively strip carriers' procedural rights of any meaning, and deprive carriers of any meaningful opportunity to defend themselves. As such, they would exceed the Commission's authority and contravene the Act's constitutional due process protections.

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[49] *See, e.g.*, WorldCom Comments at 46; Cable & Wireless Comments at 15; Sprint Comments at 11; AT&T Corp. at 36.

[50] WorldCom Comments at 47-49. *See also* Time Warner Comments at 39; Ascent Comments at 7-8; and Focal, *et al.*, Comments at 22-34 (Focal, *et al.*, go so far as to suggest that any performance reports that are established should themselves be considered NALs).

CLEC proposals that the Commission impose self-enforcing liquidated damages requirements fare no better. As discussed in SBC's Comments in the *UNE Performance Measurements Proceeding*, Congress specified in section 208 and related provisions the procedures the Commission must follow to award damages for any violation of the Act.[51] Those procedures cannot be reconciled with the liquidated damages scheme proposed by CLECs. In particular, those procedures require that an aggrieved party file a formal complaint, that the Commission conduct a hearing, and that a complainant prove through record evidence that it has suffered specific damages as a result of allegedly unlawful conduct.[52] Liquidated damages would short-circuit each of these procedures, and thus do violence to the substantive and procedural requirements of the Act.

Apparently recognizing that the Commission lacks authority to adopt self-enforcing liquidated damages requirements, Time Warner proposes that the Commission effectively mandate the same thing, but in a different guise. In particular, it proposes that the Commission require ILECs to provide discounts in the form of "self-enforcing reductions or waivers" of special access charges for failure to meet performance standards.[53] Time Warner claims that the Commission "did just this when it required that the ILECs set the price for interconnection purchased by the so-called 'other common carriers' or 'OCCs' prior to implementation of equal access at a discount of 55 percent below the price charged to AT&T."[54]

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[51] SBC Comments in CC Docket No. 01-318 at 36-38.

[52] *Id.* (discussing the procedural requirements of the Act).

[53] Time Warner/XO Comments at 38.

[54] *Id.*, citing *MTS & WATS Third Report and Order* ¶ 151.

Time Warner's reliance on the Commission's decision to require ILECs to discount Feature Group B service prior to implementation of equal access is misplaced. In that case, the Commission did not require carriers to provide a discount for failing to meet service quality requirements in the provision of Feature Group B service. Rather, it prescribed a rate for one service, Feature Group B, that was lower than that for another service, Feature Group D, because Feature Group B was fundamentally different from Feature Group D service. The Commission's *MTS & WATS* decision therefore is wholly inapposite.

In any event, Time Warner's proposal is nothing more than liquidated damages by another name, and thus an end-run around the requirements of the Act. As such, it must be rejected.

V. CONCLUSION

Special Access performance measures and enforcement mechanisms are patently unnecessary, and contrary to the language and goals of the Act. Special access performance measures therefore should not be adopted.

Respectfully submitted,

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